

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JAVIER TORRES NEGRON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 11-1264 (DRD)
(CRIMINAL 08-0204(DRD))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On May 27, 2008, petitioner Javier Torres Negron and 110 other defendants were charged in a seven-count indictment which included charges for serious narcotics and weapons violations, including a forfeiture count. (Criminal 08-0204 (DRD), Docket No. 3.) Petitioner was charged in all counts.

This matter is before the court on motion filed by petitioner Javier Torres Negron on March 15, 2011 to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (Docket No. 1.) The government filed a response in opposition to the motion on June 13, 2011. (Docket No. 3.) The matter was referred to me for report and recommendation on February 7, 2012. (Docket No. 5).

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Having considered the arguments of the parties and for the reasons set
forth below, I recommend that the petitioner's motion to vacate sentence be
DENIED.

8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 On September 21, 2009, petitioner Javier Torres Negron filed a motion for
10 change of plea. (Criminal 08-0204 (DRD), Docket No. 2306.) On October 6,
11 2009, he pleaded guilty before me to counts one and six of the seven-count
12 indictment. (Criminal 08-0204 (DRD), Docket No. 2374.) He was charged in the
13 first count in that he did knowingly and intentionally combine, conspire,
14 confederate and agree together and with each other and with diverse other
15 persons, to commit an offense against the United States, that is, to knowingly and
16 intentionally possess with intent to distribute and distribute controlled substances,
17 to wit: in excess of fifty grams of cocaine base, a Schedule II Narcotic Drug
18 Controlled Substance; and/or in excess of one kilogram of heroin, a Schedule I
19 Narcotic Drug Controlled Substance; and/or in excess of five kilograms of cocaine,
20 a Schedule II Narcotic Drug Controlled Substance, and/or in excess of 100
21 kilograms of marijuana, a Schedule I Controlled Substances, within 1,000 feet of
22 the real property comprising a public or private school and/or housing facility
23 owned by a public housing authority and/or a playground, as prohibited by Title
24 21, United States Code, Section 841(a)(1) and 860. All in violation of 21 U.S.C.
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4 § 846. (Criminal 08-204 (DRD), Docket No. 3.) Count SIX of the indictment
5 charges that from no later than in or about 2003 up to the date of the indictment,
6 in the District of Puerto Rico and within the jurisdiction of this court, petitioner did
7 knowingly did knowingly and intentionally combine, conspire, confederate and
8 agree together and with each other and with diverse other persons, to commit an
9 offense against the United States, that is to knowingly and intentionally possess
10 firearms during and in relation to a drug trafficking crime as charged in Counts
11 One through Five, as prohibited by Title 18, United States Code §924(c)(1)(A).
12 All in violation of 18 U.S.C. § 922(o). According to a plea agreement signed by
13 petitioner, the remaining counts were to be dismissed at the time of sentence.

14 The plea agreement was signed by petitioner on the same day that
15 petitioner entered a guilty plea pursuant to Rule 11(c)(1)(B) of the Federal Rules
16 of Criminal Procedure. (Criminal 08-0204 (DRD), Docket No. 2372.)

17 The sentencing hearing was held on February 9, 2010. The court sentenced
18 the petitioner to 180 months of imprisonment as to Count One and 180 months
19 as to Count Six to be served concurrently with each other. (Criminal 08-0204
20 (DRD), Docket No. 3261.) Petitioner was also sentenced to serve a ten year term
21 of supervised release in Counts One and Six, to be served concurrently.

22 On March 15, 2011, petitioner filed a motion to vacate, set aside or correct
23 sentence pursuant to 28 U.S.C. § 2255. (Docket No. 1.) Petitioner claims that
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4 he suffered due to ineffective assistance of counsel, since his attorney failed to
5 adequately investigate his mental competency and ability to knowingly and
6 intelligently enter a plea. He also alleges ineffective assistance of counsel in that
7 a downward departure was not sought pursuant to U.S.S.G. §5K2.13. Petitioner
8 argues that his sentence was disproportionate and violated the Eighth
9 Amendment, notwithstanding the plea agreement (which the sentencing court
10 favorably followed). Finally, petitioner argues that counsel was ineffective for
11 failing to request consideration for adjustments related to Amendment 706 of the
12 United States Sentencing Commission Guidelines, and for failing to preserve his
13 rights under the Fair Sentencing Act of 2010. The short answer to this last
14 argument is that petitioner was held accountable for a large amount of cocaine
15 and not cocaine base, thus rendering application of Amendment 706 inapplicable.
16 The short answer to the other arguments is that there is nothing in the record or
17 in the Pre-Sentence Investigation Report to reflect an issue of mental capacity.
18 The sentence, one which was bargained for, can hardly be viewed as excessive
19 under the circumstances. A life sentence might have been excessive, but still
20 within the parameters of a legal sentence.

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22 On June 13, 2011, the government filed a response in opposition to the
23 petitioner's motion arguing basically that it should be summarily denied because
24 it is untimely. The government does not address the merits of the petition.

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4 Docket No. 3.) It notes that judgment was entered on February 16, 2010 and
5 that no appeal was filed. (Criminal 08-0204 (DRD), Docket No. 3262.)
6 Therefore the conviction became final on March 2, 2010.
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8 II. ANALYSIS

9 Under 28 U.S.C. § 2255, a federal prisoner may move for post conviction
10 relief if:

11 the sentence was imposed in violation of the Constitution
12 or laws of the United States, or that the court was
13 without jurisdiction to impose such sentence, or that the
14 sentence was in excess of the maximum authorized by
law, or is otherwise subject to collateral attack

15 28 U.S.C. § 2255(a); Hill v. United States, 368 U.S. 424, 426-27 n.3 (1962);
16 David v. United States, 134 F.3d 470, 474 (1st Cir. 1998). The burden is on the
17 petitioner to show his or her entitlement to relief under section 2255, David v.
18 United States, 134 F.3d at 474, including his or her entitlement to an evidentiary
19 hearing. Cody v. United States, 249 F.3d 47, 54 (1st Cir. 2001) (quoting United
20 States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993)). It has been held that an
21 evidentiary hearing is not necessary if the 2255 motion is inadequate on its face
22 or if, even though facially adequate, "is conclusively refuted as to the alleged facts
23 by the files and records of the case." United States v. McGill, 11 F.3d at 226
24 (quoting Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974)). "In other words,
25 a '§ 2255 motion may be denied without a hearing as to those allegations which,
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4 if accepted as true, entitle the movant to no relief, or which need not be accepted
5 as true because they state conclusions instead of facts, contradict the record, or
6 are 'inherently incredible.'" United States v. McGill, 11 F.3d at 226 (quoting
7 Shraiar v. United States, 736 F.2d 817, 818 (1st Cir. 1984)).
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9 . The Antiterrorism and Effective Death Penalty Act instituted a limitations
10 period of one year from the date on which a prisoner's conviction became final
11 within which to seek federal habeas relief. See Pratt v. United States, 129 F.3d
12 54, 58 (1st Cir. 1997). The current petition was filed over a year from the date
13 petitioner's sentence became final and unappealable.
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15 President Clinton signed into law the Antiterrorism and Effective Death
16 Penalty Act of 1996 ("AEDPA"), which instituted a time limitation period for the
17 filing of motions to vacate or reduce criminal federal sentences. In its pertinent
18 part, section 2255 reads:
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20 A 1-year period of limitation shall apply to a motion under
21 this section. The limitation period shall run from the
22 latest of-

- 23 (1) the date on which the judgment of conviction
24 becomes final;
25 (2) the date on which the impediment to making a motion
26 created by governmental action in violation of the
27 Constitution or laws of the United States is removed, if
28 the movant was prevented from making a motion by such
government action;
(3) the date on which the right asserted was initially
recognized by the Supreme Court, if that right has been

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4 newly recognized by the Supreme Court and made
5 retroactively applicable to cases on collateral review; or
6 (4) the date on which the facts supporting the claim or
7 claims presented could have been discovered through the
exercise of due diligence.

8 28 U.S.C. § 2255, ¶ 6.

9 The terse argument of the United States, that the petition is time-barred,
10 is correct. The petition does not describe any circumstances that fall within any
11 of the exceptions which would equitably toll the limitations period of the statute.

12 See e.g. Ramos-Martinez v. United States, 638 F.3d 315, 321-24 (1st Cir. 2011).

13 Petitioner's pleading was signed on March 9, 2011, and placed in the prison legal
14 mail system on the same date. The petition was stamped at the Clerk's office on
15 March 15, 2011. If one considers that the original petition was placed in the
16 prison mail system on March 9, 2011, see Houston v. Lack, 487 U.S. 266, 270-71
17 (1988); Morales Rivera v. United States, 184 F.3d 109, 110 (1st Cir. 1999), one
18 is forced to conclude that petitioner's claim is time-barred. See Trenkler v.
19 United States, 268 F.3d 16, 24-27 (1st Cir. 2001).

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21 III. CONCLUSION

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23 I find that petitioner Javier Torres Negron's motion under 2255 is time-
24 barred. In view of the above, I recommend that petitioner's motion to vacate, set
25 aside, or correct sentence under 28 U.S.C. § 2255 be DENIED without evidentiary
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27 hearing.

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4 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
5 party who objects to this report and recommendation must file a written objection
6 thereto with the Clerk of this Court within fourteen (14) days of the party's receipt
7 of this report and recommendation. The written objections must specifically
8 identify the portion of the recommendation, or report to which objection is made
9 and the basis for such objections. Failure to comply with this rule precludes
10 further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet
11 v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass.
12 Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health
13 & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13,
14 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982);
15 Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

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17 At San Juan, Puerto Rico, this 9th day of February, 2012.

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20 S/JUSTO ARENAS
21 United States Magistrate Judge
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S/ JUSTO ARENAS

United States Magistrate Judge

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